NO. 48721-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JASON MILLER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Kathryn J. Nelson, Judge

BRIEF OF APPELLANT

JARED B. STEED
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

RULES, STATUTES AND OTHER AUTHORITIES

TABLE OF AUTHORITIES (CONT'D)

Page

A. ASSIGNMENT OF ERROR

The sentencing court erred when it treated the $200 criminal filing fee as a mandatory legal financial obligation (LFO).

Issue Pertaining to Assignment of Error

At sentencing, based on appellant's established indigence, the court waived all discretionary LFOs, including the imposition of requested department of assigned counsel fees. Where appellant was otherwise found unable to pay discretionary LFOs, did the trial court error by ordering appellant to pay a $200 criminal filing fee on the mistaken belief that it was mandatory?

B. STATEMENT OF THE CASE

The Pierce county prosecutor charged appellant Jason Miller by amended information with three counts of second degree identity theft, two counts of second degree possession of stolen property, four counts of forgery, and one count each of unlawful possession of heroin and unlawful use of drug paraphernalia. CP 15-19.

After a pretrial CrR 3.5 hearing, some of Miller's custodial statements were held admissible. CP 104-111; RP[1] 177. The trial court held a CrR 3.6 hearing on the parties' motions, and entered a ruling

[1] RP refers to the verbatim report of proceedings of November 17, 18, 19, 2015 and January 29, 2016.

adverse to Miller. CP 8-14, 97-103; RP 177-80. Miller waived his right to a jury trial. CP 20-26; RP 227-28, 242-44. The court found Miller guilty as charged following a stipulated facts bench trial. CP 76-96; RP 309-10.

The trial court sentenced Miller under the drug offender sentencing act to 25 months imprisonment to be followed by 25 months continuing treatment. CP 50-65; RP 337-38. The trial court also imposed a suspended sentence of 90 days for the unlawful use of drug paraphernalia conviction. CP 66-70; RP 338.

At sentencing, the State asked the court to impose several LFOs for the bail jumping conviction: a $500 crime victim penalty assessment, a $100 DNA database fee, a $200 filing fee, and $1,000 for the cost of appointed counsel. RP 326. Defense counsel explained that Miller had no job and "absolutely no money." RP 339. The trial court ultimately waived the cost of appointed counsel, but imposed three other LFOs it deemed mandatory – the $200 filing fee, the $500 crime victim penalty assessment, and the $100 DNA database fee. RP 339; CP 55.

Miller timely appeals. CP 119.

C. ARGUMENT

1. THE $200 CRIMINAL FILING FEE IS A DISCRETIONARY LFO.

Trial courts may order payment of LFOs as part of a sentence. RCW 9.94A.760. However, RCW 10.01.160(3) forbids imposing discretionary LFOs unless "the defendant is or will be able to pay them." In determining LFOs, courts "shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose." RCW 10.01.160(3); see also State v. Blazina, 182 Wn.2d 827, 837-39, 344 P.3d 680 (2015) (requiring trial courts to consider an individual's current and future ability to pay before imposing discretionary LFOs).

Here, the trial court complied with its obligations under RCW 10.01.160 and Blazina, determining that Miller did not have the ability to pay discretionary LFOs requested by the State. The trial court erred, however, in assuming criminal filing fees are mandatory. The nature of this fee is a question of statutory interpretation, which this Court reviews de novo. State v. Moon, 124 Wn. App. 190, 193, 100 P.3d 357 (2004) (citing State v. Thompson, 151 Wn.2d 793, 801, 92 P.3d 228 (2004)).

RCW 36.18.020 provides:

> Upon conviction or plea of guilty, upon failure to prosecute an appeal from a court of limited jurisdiction as provided

> by law, or upon affirmance of a conviction by a court of limited jurisdiction, an adult defendant in a criminal case shall be liable for a fee of two hundred dollars.

RCW 36.18.020(2)(h) (emphasis added).

In State v. Lundy, 176 Wn. App. 96, 102-103, 308 P.3d 755 (2013), this Court found that criminal filing fees are mandatory, leaving sentencing courts without discretion to waive them based on a defendant's established poverty. But the Lundy court provided no rationale and no analysis of the language of RCW 36.18.020(2)(h). See id.; see also State v. Stoddard, 192 Wn. App. 222, 225, 366 P.3d 474 (2016) (without statutory analysis, Division Three merely cites Lundy for assertion filing fee must be imposed regardless of indigency).

The language of RCW 36.18.020(2)(h) is markedly different from that in statutes imposing mandatory fees. The Victim's Penalty Assessment (VPA) is recognized as a mandatory fee, with its authorizing statute providing: "When any person is found guilty in any superior court of having committed a crime . . . there shall be imposed by the court upon such convicted person a penalty assessment." RCW 7.68.035 (emphasis added). The statute is unambiguous in its command that such a fee shall be imposed. Likewise, the mandatory nature of the DNA-collection fee statute is also unambiguous, stating: "Every sentence imposed for a crime

specified in RCW 43.43.754 must include a fee of one hundred dollars." RCW 43.43.7541 (emphasis added).

In contrast, RCW 36.18.020(2)(h) does not directly set forth a mandatory fee, providing only that: "Upon conviction ... an adult defendant in a criminal case shall be liable for a fee of two hundred dollars." (Emphasis added). Despite the fact the Legislature clearly knows how to create an unambiguous mandatory fee, which absolutely must be included in a sentence, it did not do so in this statute. RCW 36.18.020(2)(h) does not say that every sentence must include the fee or that judges may not waive the fee.

Indeed, the Washington Supreme Court's recent decision in State v. Duncan, 185 Wn.2d 430, 374 P.3d 83 (2016), acknowledges the different language found in RCW 36.18.020(2)(h). Discussing LFOs, the Duncan Court made the following observation:

> We recognize that the legislature has designated some of these fees as mandatory. *E.g.*, RCW 7.68.035 (victim assessment); RCW 43.43.7541 (DNA (deoxyribonucleic acid) collection fee); RCW 10.82.090(2)(d) (effectively making the principal on restitution mandatory). Others have been treated as mandatory by the Court of Appeals, *State v. Lundy*, 176 Wn. App. 96, 102, 308 P.3d 755 (2013) (holding that the filing fee imposed by RCW 36.18.020(2)(h) is mandatory and courts have no discretion to consider the offender's ability to pay). . . .

Duncan, 185 Wn.2d at 436 n.3 (underlined emphasis added). That the Court would identify those fees designated as mandatory by the Legislature, on the one hand, and then separately identify the criminal filing fee as one that has merely been *treated* as mandatory, on the other, indicates an identified distinction.

By directing only that the defendant be "liable" for the criminal filing fee, the Legislature did not create a mandatory fee in RCW 36.18.020(2)(h). Blacks Law Dictionary recognizes the term "liable" encompasses a broad range of possibilities -- from making a person "obligated" in law to imposing on a person a "future possible or probable happening that may not occur." Blacks Law Dictionary 915 (6th ed. 1990). Thus, "liable" can mean a situation from which a legal liability *might* arise. At best, RCW 36.19.020(2)(h) is ambiguous and, under the rule of lenity, its language must be interpreted in Miller's favor. State v. Jacobs, 154 Wn.2d 596, 601, 115 P.3d 281, 283 (2005).

In response, the State might argue that this court should decline to consider this argument because Miller did not object at sentencing. However, RAP 2.5 provides that this court "may refuse to review any claim of error which was not raised in the trial court," giving this court ample discretion. Moreover, RAP 1.2 expresses a clear preference to liberally interpret the rules of appellate procedure "to promote justice and

facilitate the decision of cases on the merits." In light of Blazina's call to address a "broken" LFO system, see 182 Wn.2d at 835, and Duncan's recent acknowledgment that it has never determined that the criminal filing fee is mandatory, this court should address Miller's claim and decide it on the merits.

Miller asks this court to hold the criminal filing fee is a discretionary LFO and remand for resentencing so that the $200 fee may be stricken from his judgment and sentence in accordance with the trial court's waiver of all other discretionary LFOs.

2. APPEAL COSTS SHOULD NOT BE IMPOSED.

The trial court properly found Miller, who is unemployed, to be indigent, unable to pay any costs for appointed counsel at trial, and entitled to appeal at public expense. CP 112-16; RP 339. Miller's prospects for paying the costs of litigation in this Court are no better than they were in Superior Court. Therefore, if he does not prevail on appeal, he asks that no costs of appeal be authorized under title 14 RAP. See State v. Sinclair, 192 Wn. App. 380, 389-390, 367 P.3d 612 (2016) (instructing defendants on appeal to make this argument in their opening briefs).

RCW 10.73.160(1) states the "court of appeals . . . may require an adult . . . to pay appellate costs." (Emphasis added.) "[T]he word 'may' has a permissive or discretionary meaning." Staats v. Brown, 139 Wn.2d

757, 789, 991 P.2d 615 (2000). Thus, this Court has ample discretion to deny the State's request for costs. The trial court made an individualized finding, based on Miller's circumstances, that he had no ability to pay for appointed counsel at trial. RP 339. There is no basis for a contrary finding concerning the costs associated with this appeal.

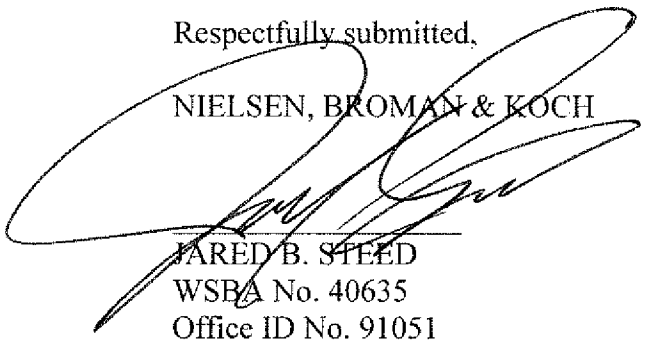
D. CONCLUSION

Miller respectfully asks this Court to strike the $200 criminal filing fee from his judgment and sentence. Assuming the State prevails on appeal and seeks reimbursement for appellate costs, this Court should deny the State's request.

DATED this 31st day of October, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



JARED B. STEED
WSBA No. 40635
Office ID No. 91051
Attorneys for Appellant

NIELSEN, BROMAN & KOCH, PLLC

October 31, 2016 - 3:31 PM

Transmittal Letter

Document Uploaded: 2-487217-Appellant's Brief.pdf

Case Name: Jason Miller
Court of Appeals Case Number: 48721-7

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Appellant's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

no Valid address for client at this time

Sender Name: John P Sloane - Email: sloanej@nwattorney.net

A copy of this document has been emailed to the following addresses:

PCpatcecf@co.pierce.wa.us
steedj@nwattorney.net